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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-521

JOHN W. WILKE, TRUSTEE IN BANKRUPTCY FOR WILLIAM S. EDGEMON, BANKRUPT,

Petitioner,

vs.

KYLE F. BROOKS AND WILLIAM CODY KELLY, TRUSTEES, AND WILLIAM CODY KELLY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The decision petitioner seeks to have reviewed by this Court is reported at 515 F. 2d 741 (6th Cir., 1975) and not at 515 F. 2d 74 (6th Cir., 1975) as set forth in petitioner's Petition for a Writ of Certiorari.

JURISDICTION

Respondents concur in petitioner's statement of the grounds on which the jurisdiction of this court is invoked.

QUESTIONS PRESENTED

Respondents are not satisfied, by any means, with the questions presented by petitioner. The trial of this case in the District Court consumed eight days, during which an extraordinary amount of testimony and exhibits, unrelated to the issues of the case and extremely prejudicial to the respondents were received into evidence over respondents' objections. Respondents sought final judgment from the Court of Appeals for the Sixth Circuit, or in the alternative, a new trial, following the entrance of judgment against them by the District Court. Final judgment was rendered by the Court of Appeals for respondents for the reason "that the district court erred in denying (respondents') motion for directed verdict." (Opinion, Petitioner's App. A, p. 2a.)

Petitioner's questions for review give his limited version of the reason why the Court of Appeals decided against him, but do not state the real question presented, i.e., were the respondents entitled to a directed verdict on the facts of this case?

William Cody Kelly was the real defendant in the trial of the case and he will hereafter be referred to as "defendant", "Kelly", or "respondents", William S. Edgemon, the bankrupt, as "Edgemon" and John W. Wilke, his trustee in bankruptcy as "plaintiff" or "petitioner".

The question for review is restated as follows: Was not the Court of Appeals correct in concluding that respondents were entitled to a directed verdict:

> Where trustee/petitioner failed completely to establish a voidable preference under Section 60 (a) (1) of the Bankruptcy Act (11 U.S.C. Sec. 96 (a) (1)) in that he failed to offer any evidence or proof (1) that the transfer of stock took place within the four-

month period prior to bankruptcy, (2) when the bankrupt-to-be was insolvent,

Where the transferee and his agents had no reasonable cause at the time the transfer was made to believe that the transferor was insolvent,

Where by the terms of the transfer the transferee became not only a secured creditor and pledgee, but the vendee and owner of the stock transferred, and

Where the trustee failed to prove waiver or estoppel against respondents, in that he failed to prove, among other requirements of waiver and estoppel, that defendant made any false representations or concealed anything he was obliged to divulge, or had any knowledge of representations made by the transferor to others.

STATUTORY PROVISIONS INVOLVED

Respondents assert, and the Court below held, (Opinion, Petitioner's App. A, pp. 13a, 14a), that Section 608.-32 of the Florida Statutes, cited by petitioner under this heading, had no application to the validity of defendant's secured interest in the Monastery Gardens, Inc. stock.

Section 614.03 of the Florida Statutes, not cited by petitioner, has a direct bearing on this case. It was in full force and effect when the transfer took place in 1962 (App. 420, 421) and provided as follows:

614.03 Transfer of title to certificates and shares

(1) Title to a stock certificate and to the shares represented thereby can be transferred only:

(a) By delivery of the certificate endorsed either in blank or to a specified person by the person appear-

ing by the certificate to be the owner of the shares represented thereby, or,

(b) By delivery of the certificate and a separate document containing a written assignment of the certificate, or a power of attorney, to sell, assign or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby; such assignment or power of attorney may be either in blank or to a specified person; or,

(c) By delivery of the certificate with an assignment indorsed thereon or in a separate instrument signed by the trustee in bankruptcy, receiver, guardian, executor, administrator or other person duly authorized by law to transfer the certificate on behalf of the person appearing by the certificate to be the owner of the shares represented thereby.

(2) The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent.

Laws 1943, c.21894, Sec. 3; Laws 1955, c29615, Sec. 7.

History and Source of Law

The amendatory Act of 1955, in subsection (2), substituted "by-laws" for "bylaws".	Uniform Act: Section differs from Uniform Stock Transfer Act, Sec. 1, 6 Uniform Laws Annotated, in that subsec. (1) (c) has been added.

STATEMENT OF THE CASE

On May 31, 1962, Edgemon and one Robert Bellucci were indebted to Kelly for a very substantial amount of money, by reason of their defaulting on a certain transaction entered into previously by and between Edgemon, Bellucci and Kelly. If the default were not cured by September 1, 1962, the amount of the indebtedness would total $202,722.13. (App. 48, 557; Deft. Exh. 2.) Edgemon at that time was the owner of all the issued and outstanding shares of the stock of a Florida corporation, Monastery Gardens, Inc. (App. 47.) Edgemon and Bellucci on that 31st day of May 1962, executed a written agreement with Kelly (App. 38, 497, 558-561; Deft. Exh. 5) and, pursuant to the agreement, Edgemon forthwith assigned, transferred and delivered the certificates to all of the issued and outstanding shares of Monastery Gardens, Inc. to Kelly as security for the indebtedness. Pursuant to the agreement Kelly extended the time for payment of all the indebtedness to September 1, 1962. (App. 101, Deft. Exh. 2.) Edgemon gave Kelly a brochure (appraisal and operating expenses) on Monastery Gardens, Inc., showing that it was in the business of operating a tourist attraction (Spanish Monastery) in North Miami, Florida (App. 263, Deft. Exh. 4). The agreement provided that the transfer of the stock by Edgemon was security for the payment of the Edgemon-Bellucci indebtedness, and further, that in the event the Edgemon-Bellucci indebtedness were paid to Kelly on or before September 1, 1962, then and in that event Kelly would reconvey said stock to Edgemon. The agreement further provided that in the event the debt owed Kelly was not paid by September 1, 1962, Kelly was entitled at any time thereafter to exercise all the rights of ownership of the

stock, including sale of the shares and any or all of the assets of the corporation. The agreement also provided that in the event Kelly sold the shares and/or assets for more than the amount of the indebtedness existing at the time of sale, then the difference would be paid to Edgemon. Contrariwise, if the sale resulted in proceeds which amounted to less than the indebtedness, Edgemon would remain indebted to Kelly for that difference, and Kelly could proceed at law to collect the deficiency.

The indebtedness was not paid by September 1, 1962.

Pursuant to this contract, on or before June 25, 1962, Edgemon also delivered to Kelly the stock book and minute book of Monastery Gardens, Inc. with executed stock Certificate No. 15, issued to Kelly, for all of the 1,000 outstanding shares of Monastery Gardens, Inc. (App. 39, 40, 101, 473, 561; Deft. Exh. 14.) Edgemon thereafter continued to be in charge of the operations of Monastery Gardens, Inc. (App. 40.)

In 1964 Edgemon fraudulently arranged a sale by Monastery Gardens, Inc. of all its assets to the St. Bernard Foundation. The Foundation was a charitable corporation formed by the Episcopal Church Diocese of Southern Florida. (App. 42, 43, 414.) As a result of that sale the Foundation, in 1964, became the title holder of record of all of the real and personal property of Monastery Gardens, Inc., held itself out to the world as such, and used the premises as a church. Although it did not appear of record, the sale price had only been partially paid. (App. 42, 43, 257, 414; Pltf. Exh. 6.)

Immediately upon learning in August 1965 of the Monastery Gardens, Inc.-Foundation fraudulent sale, Kelly advised the Foundation that he was the sole shareholder of Monastery Gardens, Inc. and objected to the transaction. (App. 212, 402, 440; Deft. Exh. 8, 9, 11.) Kelly

and the Foundation later agreed to complete the sale for a lesser amount of the balance of the purchase price due than had been originally contemplated, and closed in December of 1966. (App. 430-440.)

At the closing the Foundation paid the reduced balance of the purchase price to Monastery Gardens, Inc. and Monastery Gardens, Inc. used the money and bonds so received to purchase all of its outstanding stock from Kelly and began dissolution proceedings on closing day. (App. 430-440, 422.)

From the above facts it is unquestionably clear that the balance of the purchase price went directly to Monastery Gardens, Inc. and not to Edgemon. (App. 430-440.) On January 31, 1967, Edgemon filed a voluntary petition in bankruptcy and this suit was subsequently brought by the trustee in bankruptcy to recover the money and value of the bonds paid Kelly for his stock in Monastery Gardens, Inc. The trustee alleged a preference, although Edgemon was the bankrupt and not Monastery Gardens, which was solvent on termination of business.

Kelly maintained in his answer and throughout the court proceedings that the transfer of stock in 1962 was not a preference, because it occurred four years and eight months before Edgemon's bankruptcy, and for the other reasons set out in our restatement of the questions presented, and that the date of the sale of his stock to Monastery Gardens had no bearing on its acquisition date from Edgemon.

REASONS FOR DENYING THE WRIT

The Decision Below is Not in Conflict with Applicable Decisions of the United States Supreme Court, Nor With Decisions of Other United States Courts of Appeals, and There Is No Conflict between Courts of Appeals Requiring that the Question Presented Herein be Settled By This Court.

There is only one question of law presented to this Court arising out of the decision below, and that pertains to under what circumstances a District Court should direct a verdict for the defendant. This is a question which has been exhaustively treated by United States courts and concerning which there are no conflicts in the established case law. Conflicting facts are not the same as conflicting case law.

The decision of the Court below contains more than a dozen valid grounds why a verdict should have been directed in this case. Petitioner has excerpted one portion of one of the grounds and endeavored to create a showing of conflict with decisions of this Court and with decisions of certain United States Courts of Appeals. The excerpted portion concerns the question as to when a jury may reject uncontradicted evidence. As will be shown, there are no conflicts even on this excerpted question.

Petitioner attempts, by citing certain opinions in his brief, to demonstrate a claimed conflict among decisions involving the question of when uncontradicted testimony may be rejected by a jury. The decision in each one of the cases cited turned on its own particular set of circumstances. In certain of these cases the uncontradicted testimony concerned was held by the courts to be testimony that a jury could not reject under the particular

circumstances and in certain other of the cases the courts held that the particular uncontradicted testimony involved could be rejected because of the particular circumstances. These decisions are not, however, in conflict with one another, as one is clearly distinguishable from the other by virtue of its individual circumstances.

We shall discuss each case cited by petitioner in alphabetical order, while treating this Court's decisions first.

As was well stated in *Chesapeake & Ohio Railway Company* v. *Martin,* 283 U.S. 209, 216, 75 L.Ed. 983, 988 (1931):

> "It is true that numerous expressions are to be found in the decisions to the effect that the credibility of an interested witness always must be submitted to the jury, and that that body is at liberty to reject his testimony upon the sole ground of his interest. But these broad generalizations cannot be accepted without qualification. Such a variety of differing facts, however, is disclosed by the cases that no useful purpose would be served by an attempt to review them."

Distinguishing factors in the various opinions cited by petitioner include the absence or presence of corroborating testimony, substantiating documentary evidence, the plausibility, reasonableness or probability of the testimony, whether it is reinforced by review of the entire circumstances, whether the testimony is factual or opinion testimony, and last but not least, whether the party offering the testimony has the burden of proof as to the facts which the testimony covered. With respect to the latter point, it is important to note the distinction between interpreting a decision to mean that the uncontradicted testimony of the party having the burden of proof may be rejected as opposed to interpreting it to mean that the uncontradicted testimony does not suffice to meet the

burden of proof. In the case before this Court the uncontradicted testimony came from defendant and three of the witnesses offered by him, on an issue in which the petitioner, and not the defendant, had the burden of proof. In addition, defendant produced substantiating documentary evidence in depth and quality.

This Court, in *Chesapeake & Ohio Railway Company* v. *Martin,* 283 U.S. 209, 215, 75 L.Ed. 983, 987, stated that the particular testimony that could not be rejected was "reasonable upon its face and in accordance with probability; and not only is it wholly unchallenged by other evidence or circumstances; but it is completely corroborated by the undisputed facts." This statement applies with full force to the uncontradicted testimony involved in the instant case.

In *Quock Ting* v. *United States,* 140 U.S. 417, 35 L. Ed. 501 (1891) this Court held that inherently improbable testimony, contradicted by the Court's review of the entire circumstances of the case and lacking substantial corroboration when such corroboration should have been available, need not be accepted as true.

Sonnentheil v. *Christian Moerlein Brewing Co.,* 172 U.S. 401, 43 L.Ed. 492 (1899) is a case wherein fraud was the main issue and wherein the Court held that uncorroborated testimony, standing alone, need not be accepted. That case is distinguished from the instant case in that there the transaction was purely oral and there was no documentary evidence. In our case there were not only four witnesses, including defendant, testifying to the uncontradicted matters, but their testimony was amply supported by an abundance of documentary evidence. (App. 38-39, 101, 102, 473, 497, 533, 552, 558-561, 597, 600, Deft. Exhs. 2, 4, 5, 8, 9, 11, 14, 15, 16, 17; Pltfs. Exhs. 46, 47.) This Court therein said on page 408: "Of

course, if the acceptance had been in writing, the construction of such writing would have been a question for the Court." The Edgemon-Kelly transaction was in writing. (Deft. Exh. 2, 5.) Plaintiff's Exhibit 46 included the stock certificates which Edgemon endorsed to Kelly, and the stock record book of Monastery Gardens which contained the stubs for the issued shares and the blank certificates of stock which the corporation had not issued.

Broadcast Music v. *Havana Madrid Restaurant Corp.*, 175 F. 2d 77 (2nd Cir., 1949) is a Second Circuit Court decision on this subject, wherein the Court found that uncontradicted testimony offered by the party having the burden of proof and uncorroborated by any other evidence does not necessarily meet that party's burden of proof. It is interesting to note on page 80, footnote 3 of the Court's opinion that this Court characterized the author of 8 A.L.R. 796, 797 as a "somewhat cynical commentator", while petitioner refers to him as "one astute commentator" at page 12 of his brief.

In *Brown* v. *Ford Motor Company*, 479 F. 2d 521 (5th Cir., 1973) the Court accepted the uncontradicted testimony concerned therein and pointed out that the party offering the uncontradicted testimony did not have the burden of proof, made available substantiating documentary evidence and gave testimony of an "objective nature . . . which, if untrue, was readily susceptible to impeachment." (Pg. 523 of opinion.)

Browning v. *Crouse*, 356 F.2d 178 (10th Cir., 1966), was a habeas corpus proceeding wherein the uncontradicted testimony of the petitioner that he had not been advised of his constitutional rights in a criminal case was neither accepted nor rejected. Instead, the Court held that whether the testimony was true or not, the record failed affirmatively to show that the petitioner had been

so advised. Again, because the burden of proof was on the respondents in that case the petitioner's conviction could not be upheld.

In *Dudley* v. *United States,* 428 F.2d 1196 (9th Cir., 1970), the Court accepted uncontradicted testimony, noting that it was of a positive nature as to a particular fact, was not inherently unprobable, unreasonable or questionable, and was substantiated by documentary evidence.

In *Mack* v. *Dailey,* 3 F.2d 534 (2nd Cir. 1924) the Court held that where the defendant had the burden of proof as to an affirmative defense but offered no evidence in support thereof, and where the plaintiff offered uncontradicted testimony showing the contrary, then the burden of proof as to the affirmative defense had not been met by defendant.

While in the foregoing case the defendant had the burden of proof as to an affirmative defense, in the instant case the plaintiff had the burden of proof as to the essential elements of his case.

Powers v. *Continental Casualty Company,* 301 F.2d 386 (8th Cir., 1962) held that where the party who offered uncontradicted testimony had the burden of proof and where his testimony was totally discredited his uncontradicted testimony did not suffice to meet his burden of proof.

Southeastern Canteen Co. v. *C.I.R.,* 410 F.2d 615 (6th Cir., 1969) presented a situation wherein the testimony was uncontradicted, was corroborated by other evidence, and substantiated by the Court's "review of the entire circumstances" and therefore was accepted as true.

In *Spero-Nelson* v. *Brown,* 175 F.2d 86 (6th Cir., 1949) the Court held that opinion testimony as to the value of a diamond bracelet, offered by plaintiff's witness was not

conclusive as to the value of that bracelet where it was contradicted by other evidence in the case, including documentary evidence. The Court also relied heavily upon the fact that the contradicted testimony was unclear and unconvincing. Actually, this was not a case of uncontradicted testimony when it is fully analyzed.

Sun Life Assurance Co. of Canada v. *Stacks,* 187 F.2d 17 (7th Cir., 1951) is another case involving the distinction between uncontradicted testimony of a party having the burden of proof and that of a party not having the burden of proof, and it was held therein that the party having the burden of proof did not necessarily meet that burden as to an essential element of his case, even though he offered uncontradicted testimony on the point, because there was no corroborating evidence and his testimony was inconsistent with known facts.

In the case before this Court petitioner had the burden of proving, among other essential elements of a preference, that the transfer took place within the four-month period prior to Edgemon's going into bankruptcy, which petitioner utterly failed to do. His proof was directed to the date on which Monastery Gardens, Inc. purchased from defendant the stock which had been transferred and delivered to him in 1962. Petitioner offered no proof as to the date transfer was made. All of the proof on this subject was offered by defendant, whose proof consisted of four witnesses, including defendant, plus a great weight of substantiating documentary material, and the reasonableness and probability of all the circumstances. (App. 38, 39, 101, 102, 473, 497, 533, 552, 558-561, 597, 600; Deft. Exh. 2, 4, 5, 8, 9, 11, 14, 15, 16, 17; Pltf. Exh. 46, 47). There would have been no reason for Monastery Gardens to pay defendant for its stock if he did not hold ownership thereof.

Petitioner's question of estoppel has been well answered in the decision of the Court below, where it states (Opinion, Petitioner's App. pp. 13a, 14a):

> "While no doubt one purpose of this cited Florida statute is the protection of creditors of the corporation, we fail to see how it has anything to do with protection of the creditors of a stockholder. As a pledgee, Kelly did all that was required by Florida law to perfect his security interest and give other creditors notice thereof. No creditor of Edgemon could have been misled as to Edgemon's claimed ownership of the corporation if he had asked to see the certificates of stock, since they were in Kelly's possession. Any liability of Kelly as a director of the corporation for failure to comply with Fla. Stat. Sec. 608.32 does not concern us here. Even assuming that Kelly possessed the right under the agreement to take a more active role in the corporation affairs, and assuming further a breach of his statutory duty toward the corporation, we are cited no authority to suggest that Kelly had a duty to give notice to anyone of his lien on the Edgemon stock beyond that implicit in his possession of it. We, therefore, conclude that the estoppel theory was not applicable under the proofs in the case and that it should not have been submitted to the jury."

Nowhere does Plaintiff establish knowledge by Kelly of any reliance by creditors on Edgemon's operation of Monastery Gardens, which ceased in 1964 when the St. Bernard Foundation took over the premises and operated it as a church. (App. 257.) Kelly had no knowledge of Edgemon's financial problems until Edgemon went into bankruptcy (App. 473, 474), nor did he have any knowledge of the 1964 sale to the Foundation or of the Ulrich episode, until August, 1965 (App. 43, 76, 212, 402, 440-477, 533, 534, Deft. Exh. 8, 9, 11 and 12).

Federal and State case law stand firm on the elements which are necessary to create an estoppel against one person in favor of another. Some of the leading cases on this subject are cited below:

Wiser v. *Lawler,* 189 U.S. 260, 270, 271-272, 47 L. Ed. 802, 809, 810 (1903) states:

> "To constitute an estoppel by silence there must be something more than an opportunity to speak. There must be an obligation. This principle applies with peculiar force where the persons to whom notice should be given are unknown. So, too, to constitute an estoppel, either by express representation or by silence, there must not only be a duty to speak, but the purchase must have been made in reliance upon the conduct of the parties sought to be estopped;
>
> "* * * The authorities also recognize a distinction between mere silence and a deceptive silence accompanied by an intention to defraud, which amounts to a positive beguilement. Summer v. Seaton, 47 N. J. Eq. 103; Hill v. Epley, 31 Pa. St. 331; Markham v. O'Connor, 52 Georgia 183.
>
> "* * * No duty to speak arises from the mere fact that a man is aware that another may take an action prejudicial to himself if the real facts are not disclosed. Sullivan v. Davis, 29 Kansas, 28. As stated by Bigelow on Estoppel, 5th ed., page 596:
>
> 'So long as he is not brought in contact with the person about to act and does not know who that person may be, he is under no obligation to seek him out, or to stop a transaction which is not due to his own conduct, as the natural and obvious result of it.' It cannot be that A would be estopped by silence with respect to his title to property which B is about to purchase, when he has no knowledge that B contemplates buying and B has no knowledge that A is con-

> nected with the property. We know of no case holding that a man is estopped by silence as against the public, or any particular person with whom he has no fiduciary relation. It was said by the Court of Appeals of New York in Viele v. Judson, 82 N. Y. 32, 40, of the cases holding a party to be estopped by silence: 'In all of them the silence operated as a fraud and actually itself misled. In all there was both the specific opportunity and apparent duty to speak. And, in all, the party maintaining silence knew that someone else was relying upon that silence, and either acting or about to act as he would not have done had the truth been told. Those elements are essential to create a duty to speak.' "

In *Oklahoma* v. *Texas,* 268 U.S. 252, 257, 69 L. Ed. 937, 943 (1925), this Court said:

> "Only where conduct or statements are calculated to mislead a party and are acted upon by him in good faith to his prejudice can he invoke them as a basis of such an estoppel."

In *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 323, 80 L. Ed. 688, 698 (1936), this Court said:

> "Estoppel in equity must rest on substantial grounds of prejudice or change of position, not on technicalities."

The instant case presented its own peculiar set of facts. The decision made by the Sixth Circuit Court of Appeals will effect few other cases, and is important only to the litigants involved. Petitioner himself does not claim otherwise. It is also apparent that the decision of the Court below was reached only after a thorough review of the record and the exercise of sound judicial judgment.

It is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

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